

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 05-11161 RGS

OLIVER UDEMBA, *
Plaintiff *
 *
v. *
 *
CUMBERLAND FARMS, INC., and *
EMILE C. TAYEH, *
Defendants *

PLAINTIFF'S MOTION TO VACATE JUDGMENT

Plaintiff Oliver Udemba, by his new counsel Scott A. Lathrop, hereby moves, pursuant to Rule 60(b)(1) and (6), to vacate the judgment entered in the case on July 5, 2006. The grounds for this Motion are as follows.

I. Background

On June 3, 2005, plaintiff Oliver Udemba, through attorney Aderonke Lipede, filed the Complaint in this action against the defendants Cumberland Farms, Inc., and Emile E. Tayeh. Udemba brought claims of unlawful discrimination on the basis of his race (black) in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 and the Massachusetts anti-discrimination statute, M.G.L.c. 151B, § 4(1). Udemba brought these claims after the EEOC had found reasonable cause to believe that violations of the statutes occurred with regard to some or all of the matters alleged in his charge but could not obtain a settlement with defendants that would provide relief to Udemba. (Exhibit 1 attached hereto.)

According to the Docket Sheet in this case, the defendants did not file an Answer until October 27, 2005.

Further according to the Docket Sheet, on January 17, 2006, defendants filed a Motion to Compel Discovery. After Atty. Lipede filed no opposition to this Motion, the Court on February 6, 2006, granted the Motion to Compel and allowed defendants to apply for reasonable costs and fees.

On February 8, 2006, defendants filed a Motion for Attorney Fees and Costs. The Docket Sheet contains no record of Atty. Lipede filing any opposition to this Motion. On March 1, 2006, the Court granted the Motion for Attorney Fees.

On February 17, 2006, defendants filed a Second Motion to Compel Discovery. The Docket Sheet contains no record of Atty. Lipede filing any opposition to this Motion. On March 11, 2006, the Court granted the defendants' Second Motion to Compel Discovery.

On March 21, 2006, the defendants filed a Motion for Attorney Fees and Costs associated with their Second Motion to Compel Discovery. The Docket Sheet contains no record of Atty. Lipede filing any opposition to this Motion. On March 31, 2006, the Court granted the Motion for Attorney Fees.

On May 30, 2006, defendants filed a Motion for Summary Judgment. The Docket Sheet contains no record of Atty. Lipede filing any opposition to this Motion. On June 30, 2006, the Court granted the Motion for Summary Judgment and entered Judgment on July 5, 2006.

On July 6, 2006, the defendants filed a Motion for Attorneys Fees and Costs and to Amend the Judgment to Include Award of Attorney's Fees and Cost. The Docket Sheet contains no record of Atty. Lipede filing any opposition to this Motion.

On August 13, 2006, the undersigned formally entered his appearance in this case on behalf of Udemba and attempted to find out from Atty. Lipede the rationale for her actions or inactions.

Attached as Exhibit 2 is an affidavit from Atty. Lipede in which she states, inter alia, that upon receiving defendants' Motion for Summary Judgment, she "erroneously noted in [her] Day Minder that Plaintiff's response would be due on July 21, 2006." (Ex. 2, ¶ 3) Atty. Lipede also states that on or about July 14, 2006, she received defendants' Motion for Fees indicating that a Judgment had been entered. "I did not receive a notice that judgment had been entered prior to receiving Defendants' Motions for Fees." (Ex. 2, ¶ 4)

II. Legal Standards

Under Rule 60(b) a court may relieve a party from a final judgment for the following reasons:

"(1) mistake, inadvertence, surprise, or excusable neglect;

...

(6) any other reason justifying relief from the operation of the law."

It is true that at least the First Circuit has repeatedly turned a deaf ear to the plea that the sins of the attorney should not be visited upon the client. See KPS & Associates v. Designs by FMC, Inc., 318 F.3d 1, 16 (1st Cir. 2003). However, the First Circuit has also noted that: "Although clause (1) of Rule 60(b) mentions neglect, when an attorney's neglect is gross and inexcusable courts have held that relief may be justified under Rule 60(b)(6)." Chang v. Smith, 778 F.2d 83, 85 (1st Cir. 1985).

In the KPS case the First Circuit held (supra at 17) that if relief were to be sought for “grossly negligent” counsel, relief should first be promptly sought by new counsel under Rule 60(b) in the district court, citing Community Dental Services v. Tani, 282 F.3d 1164, 1180 (9th Cir. 2002); Carter v. Albert Einstein Medical Center, 804 F.2d 805 (3rd Cir. 1986); Boughner v. Sec’y of HEW, 572 F.2d 976, 977 (3rd Cir. 1978).

III. Atty. Lipede Was “Grossly Negligent” And As Such The Judgment Should Be Vacated

Based upon the Docket Sheet alone, it is apparent that Atty. Lipede was grossly negligent in her handling of Oliver Udemba’s court complaint. On six separate occasions the defendants filed motions to which Atty. Lipede never responded. She never responded to motions filed on January 17, 2006, February 8, 2006, February 17, 2006, March 27, 2006, May 30, 2006 and July 6, 2006. In fact, Atty. Lipede never responded to any motion ever filed by the defendants. Neither did Atty. Lipede ever file any motion seeking relief from or reconsideration of any order by this Court. Atty. Lipede was grossly negligent in her handling of this case from virtually the onset.

While Rule 60(b) relief is indeed limited to the extraordinary situation, this is just such an extraordinary situation. Over the course of months Atty. Lipede was negligent in her handling of this case (if one could say she handled it at all) and by her handling of the case caused it to be dismissed even though the EEOC had found reasonable cause to believe Udemba’s allegations.

It is therefore within this Court’s power and discretion under Rule 60(b) to vacate the Judgment entered on July 5, 2006, and allow Udemba to properly pursue his Complaint. We respectfully request that this Court exercise that discretion.

WHEREFORE the Judgement in this case should be vacated.

Oliver Udemba
By his attorney

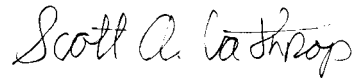


Scott A. Lathrop, Esq.
Scott A. Lathrop & Associates
122 Old Ayer Road
Groton, MA 01450
(978) 448-8234
BBO No. 287820

Dated: August 17, 2006

Certificate of Service

I, Scott A. Lathrop, hereby certify that I have served the foregoing Motion on the defendants by mailing this day a copy to the last known address of their Attorney of Record.



Scott A. Lathrop

Dated: August 17, 2006

NOTICE OF RIGHT TO SUE
(CONCILIATION FAILURE)

To: **Oliver Udemba**
76a Beaver Park
Framingham, MA 01702

From: **Boston Area Office**
John F. Kennedy Fed Bldg
Government Ctr, Room 475
Boston, MA 02203



On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR § 1601.7(a))

EEOC Charge No.

EEOC Representative

Telephone No.

161-2004-00170

Robert L. Sanders,
Director

(617) 565-3200

TO THE PERSON AGGRIEVED:

This Notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

- NOTICE OF SUIT RIGHTS -

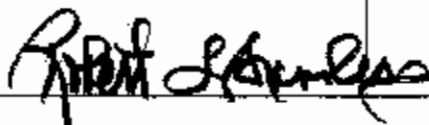
(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed **WITHIN 90 DAYS** of your receipt of this Notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission



Robert L. Sanders,
Area Office Director

MAR 04 2005

(Date Mailed)

Enclosure(s)

cc: **CUMBERLAND FARMS**
c/o Philip Moss, Esq.
Moon, Moss, McGill & Shapiro, PA
P.O. Box 7250
Portland, ME 04112-7250

Hrones & Garrity
Lewis Wharf, Bay 232
Boston, MA 02110-3927

Ex. 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

OLIVER UDEMBA,

Plaintiff,

v.

CLIMBERLAND FARMS, INC.
AND EMILE C. TAYEH,

Defendants.

CIVIL ACTION NO: 05CV 11161 RGS

**AFFIDAVIT OF ADERONKE LIPEDE IN SUPPORT OF MOTION TO
VACATE JUDGMENT**

I, Aderonke O. Lipede, do hereby depose and state the following:

1. I am an attorney duly licensed to practice law in the Commonwealth of Massachusetts.
2. On or about June 5, 2006, I received the Defendants' Motion for Summary Judgment With Incorporated Memorandum.
3. Upon receiving the Defendants' Motion, I erroneously noted in my Day Minder that Plaintiff's response would be due on July 21, 2006. See Attached 2006 Day Minder Book of Aderonke Lipede
4. On or about July 14, 2006, I received Defendant's Motion for Fees indicating that a Judgment had been entered. I did not receive a notice that a judgment had been entered prior to receiving Defendants' Motions for Fees.
5. Upon learning of my mistake, on July 14, 2006, I immediately contacted the Plaintiff Oliver Udemba ("Mr. Udemba").

6. Mr. Udemba met with me in my office on July 14, 2006. When I explained what had happened due to my error, Mr. Udemba, rightfully so, fired me and informed me that he would be seeking other counsel, and would rather have successor counsel handle any responses to the motions.

7. As I did not have Mr. Udemba's complete file in my office on July 14, 2006, arrangements were made for me to turn over the file to Mr. Udemba.

8. On July 20, 2006, I turned over the complete file to Mr. Udemba, who told me that he had, in fact, retained other counsel.

9. When I turned over the file to Mr. Udemba, I asked if successor counsel had filed an appearance in the case. Mr. Udemba stated that he expected successor counsel to file an appearance on Monday July 23, 2006. Mr. Udemba took the file.

10. On July 21, 2006, Mr. Udemba telephoned me and told me that successor counsel had not made a decision to file an appearance until after reviewing the file.

11. I advised Mr. Udemba that he should permit me to file a Motion to Vacate the Judgment and an Opposition to the Motion for Summary Judgment, and that successor counsel could take over the case at a later date.

12. On the evening of July 21, 2006 Mr. Udemba returned the files to me.

13. It was my intention to complete the work over the weekend of July 22-23, 2006 and to return the file for successor counsel's review.

14. Over the weekend of July 22-23, 2006, a personal domestic situation arose. On July 23, 2006, the Boston Police Department arrested James Hite for assault and battery of me. See the attached police report and criminal complaint.

15. The complaint involving James Hite Commonwealth v. James Hite

0604CR0445 is pending in the Charlestown District Court and is scheduled for a pre-trial hearing on September 13, 2006.

16. I note that, although the police report indicates that I did not seek medical attention, I sustained significant swelling to my face and contusions about the body. I suffered swelling to the face as a result of being punched, and contusions about my body as a result of being thrown to floor.

17. As a result of the injuries I sustained, I had difficulty ambulating for several days.

18. Mr. Udemba was unsuccessful in contacting me over the last few days as I was recovering both physically and emotionally from the events of July 23, 2006.

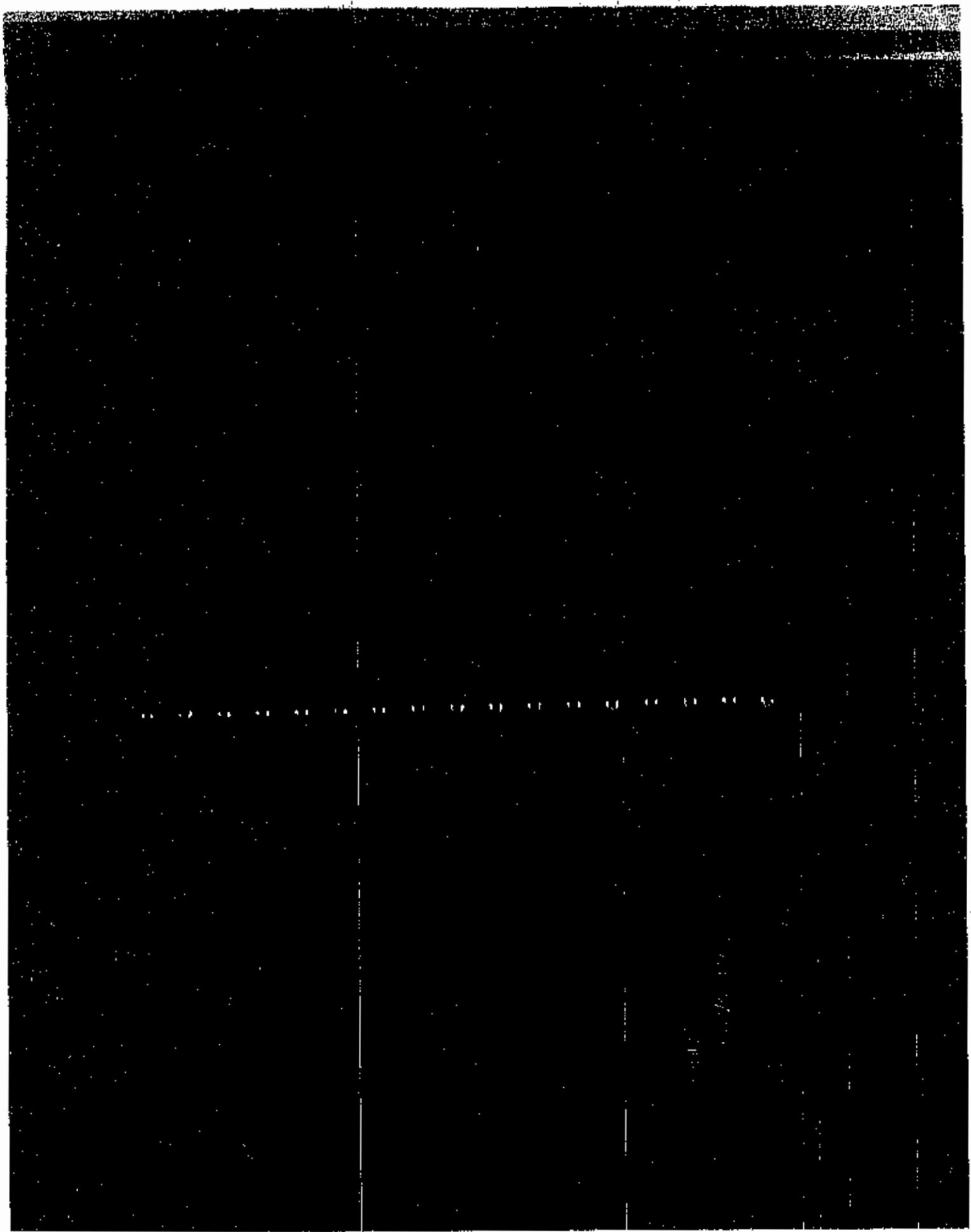
19. Mr. Udemba was not a fault in this matter and made every reasonable effort to preserve this case.

20. It is my hope that Mr. Udemba will not be penalized for my error, and if any sanctions are imposed that they be imposed against me.

Signed under the pains and penalties of perjury this 13th day of August 2006.



Aderonke O. Lipede



THURSDAY
20
SEPTEMBER

MARKY Williams
BMC

Willie Harvey
Lindemann
E. E. E. C.

FEBRUARY 21

11 days

Stat's Public
Estate

Reppendor
out

Josephine Johnson

Trey Franklin Disposition

19 WEDNESDAY
2007/10/15

22 SATURDAY

23
GENERAL
INDEX

CASEY JAVORSKI

~~SECRET~~

11

Exhibit


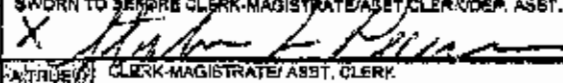

CRIMINAL COMPLAINT ORIGINAL		DOCKET NUMBER 0604CR000445	NO. OF COUNTS 1	Trial Court of Massachusetts BMC Department
DEFENDANT NAME & ADDRESS James Hite 121 BUNKER HILL ST #1G13 Charlestown, MA 02129				COURT NAME & ADDRESS BMC Charlestown 3 City Square Charlestown, MA 02129 (617)242-5400
DEFENDANT DOB 03/25/1945	COMPLAINT ISSUED 07/24/2006	DATE OF OFFENSE 07/23/2006	ARREST DATE 07/23/2006	
OFFENSE CITY / TOWN Boston		OFFENSE ADDRESS 121 Bunkerhill St.		NEXT EVENT DATE & TIME 07/24/2006 9:00 am
POLICE DEPARTMENT Boston PD - Area A-1		POLICE INCIDENT NUMBER 060396955		NEXT SCHEDULED EVENT Arraignment
DOB TBO6062194710				ROOM / SESSION Administrative Session
<p>The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date(s) indicated below the defendant committed the offense(s) listed below and on any attached pages.</p>				

COUNT CODE DESCRIPTION

1 265/13A/B A&B c265 §13A(a)

On 07/23/2006 did assault and beat Aderonke Lipede, in violation of G.L. c.265, §13A(a)

PENALTY: house of correction not more than 2 1/2 years; or not more than \$1000 fine.

SIGNATURE OF COMPLAINANT 	SWORN TO BEFORE CLERK-MAGISTRATE/ASST. CLERK/DEP. ASST. CLERK 	DATE 07/24/06
NAME OF COMPLAINANT James Rowley	CLERK-MAGISTRATE/ASST. CLERK 	DATE 07/24/06

Boston Police

Kathleen M. O'Toole, Commissioner

INCIDENT REPORT

ORIGINAL		STATUS: UNAPPROVED			
KEY SITUATION		COMPLAINT NO.	RPT DIST.	CAC RA	RPT RA
DVIP		0900000000	A15	800	800
LOCAL INCIDENT DESCRIPTION		LOCAL INCIDENT DESCRIPTION		STATUS	DATE OCCURRED FROM
					07/23/2006
LOCATION OF INCIDENT		APT	DISPATCH TIME	TIME OCCURRED FROM	TIME OCCURRED TO
121 BUNKER HILL ST			08:44 PM	08:40 PM	08:40 PM
NEIGHBORHOOD	TYPE OF BUILDING	PLACE OF ENTRY	WEATHER	LIGHTING	
CHARLESTOWN	HOUSING PROJECT	FRONT DOOR	CLEAR - NIGHT	INSIDE - WELL LIT	
TYPE OF WEAPON/TOOL	SUSPECT MODE OF TRANSPORTATION	VICTIM'S ACTIVITY		SUSPECT RELATIONSHIP TO VICTIM	
HANDS/FEET/TEETH	CAR			BOYFRIEND	
UNUSUAL ACTIONS AND STATEMENTS OF PERPETRATOR					
PROPERTY OF SUSPECT					
1 TYPE	NAME (LAST, FIRST, MI)	S.S. NO.	BOOKING NO.	DOCKET NO.	
VICTIM	LIFEDEADERONKE		0		
ALIAS	ADDRESS	GENDER	RACE	DOB	AGE
	507 TALBOT AVE 1, DORCHESTER MA 02124-0000	FEMALE	BLACK NON-HISPANIC	01/13/1968	37
HEIGHT	WEIGHT	BUILD	HAIR	EYES	
5-03	120	THIN	BLACK	BROWN	
OCCUPATION	MARITAL STATUS	CONTACT #1	CONTACT #2		
ATTORNEY		(617)-825-8435	(000)-000-0000		
SPECIAL CHARACTERISTICS (INCLUDING CLOTHING)					
WHITE SHIRT, RED PANTS					
PROPERTY OF SUSPECT					
2 TYPE	NAME (LAST, FIRST, MI)	S.S. NO.	BOOKING NO.	DOCKET NO.	
REPORTER	KERVIN MARK		0		
ALIAS	ADDRESS	GENDER	RACE	DOB	AGE
	40 SUDBURY ST., BOSTON MA 02114-0000				0
HEIGHT	WEIGHT	BUILD	HAIR	EYES	
OCCUPATION	MARITAL STATUS	CONTACT #1	CONTACT #2		
		(617)-343-4240			
SPECIAL CHARACTERISTICS (INCLUDING CLOTHING)					
PROPERTY OF SUSPECT					
3 TYPE	NAME (LAST, FIRST, MI)	S.S. NO.	BOOKING NO.	DOCKET NO.	
OFFENDER	HITE JAMES D	281-40-8951	8/184710		
ALIAS	ADDRESS	GENDER	RACE	DOB	AGE
	121 BUNKER HILL ST, CHARLESTOWN MA 00001-0000	MALE	BLACK NON-HISPANIC	03/26/1945	61
HEIGHT	WEIGHT	BUILD	HAIR	EYES	
6-01	175	SLIM	BLACK	BROWN	
OCCUPATION	MARITAL STATUS	CONTACT #1	CONTACT #2		
TENNIS INSTRUCTOR	Divorced				
SPECIAL CHARACTERISTICS (INCLUDING CLOTHING)					
GREEN SHORTS, WHITE T-SHIRT					
PROPERTY OF SUSPECT					
STATUS	TYPE OF PROPERTY	SERIAL	BRAND NAME - DESCRIPTION	SIZE	VALUE
N/A	N/A				\$0.00
NARRATIVE AND ADDITIONAL INFORMATION					
<p>ABOUT 9:40 P.M. ON SUNDAY, JULY 23, 2008 OFFICER KERVIN IN THE A415F UNIT AND OFFICER DOHERTY IN THE A416F UNIT RESPONDED TO A RADIO CALL FOR DOMESTIC VIOLENCE INTIMATE PARTNERS AT 121 BUNKER HILL ST. ON ARRIVAL OFFICER KERVIN SPOKE TO THE VICTIM (LIFEDEADERONKE) WHO STATED THAT HER BOYFRIEND OF 10 YEARS (HITE, JAMES) DURING AN ARGUMENT PUNCHED VICTIM IN THE FACE ONCE. SUSPECT STATED THAT HE WAS BREAKING UP WITH THE VICTIM AND DENIES HITTING VICTIM. AT THIS TIME SUSPECT WAS PLACED UNDER ARREST FOR ASSAULT & BATTERY UNDER 209A. VICTIM WAS OFFERED MEDICAL ATTENTION AND REFUSED. VICTIM WAS ADVISED HER RIGHTS UNDER 209A AND RECEIVED A COPY OF HER RIGHTS UNDER 209A.</p>					

Page 2 of 2

UNIT ASSIGNED	SHIFT	REPORTING OFFICER'S NAME	REPORTING OFFICER'S ID	PARTNER'S ID
A116F	5	MARK D KERRYIN	83204	11821
SPECIAL UNITS NOTIFIED (REPORTING)				
Domestic Violence Unit				
DATE OF REPORT	TIME COMPLETED	APPROVING SUPERVISOR NAME	APPROVING SUPERVISOR ID	
07/23/2006	10:40 PM	N/A	0	